No. 16300 ✓ VOL. 310

IN THE

United States

Court of Appeals

For the Ninth Circuit

RICHARD WATTS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the United States District Court for District of Arizona.

APPELLEE'S BRIEF

No. 16300

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INTRODUCTION

The Apellee, hereinafter referred to as the Government, will make the same designation as to the Reporter's Transcript and documents as made in Appellant's Brief.

JURISDICTION

The Government agrees with Appellant's statement concerning jurisdiction of the District Court and of this Court.

STATEMENT OF THE CASE

The Government agrees with Appellant's limited Statement of Facts. Additional facts pertinent to each Specification of Error will be set forth in more detail under the Argument for each Specification of Error.

ARGUMENT OF SPECIFICATION OF ERROR NO. 1

IT WAS NOT AN ABUSE OF THE TRIAL COURT'S DISCRETION AMOUNTING TO A VIOLATION OF APPELLANT'S RIGHT UNDER THE SIXTH AMENDMENT TO ALLOW APPELLANT TO DISMISS HIS COUNSEL DURING THE TRAIL OF HIS CASE.

There is no argument with the Appellant's proposition that the decision to waive counsel must be made intelligently and with full understanding of the implications forthcoming if he waives this Constitutional right of counsel guaranteed by the Sixth Amendment.

U.S. vs. Mitchell, 137 F.2d 1006, affirmed 138 F.2d 831 certiorari denied, 321 U.S. 794.

Smith vs. U.S., 216 F.2d 724

Likewise there can be no doubt that the Appellant has an unquestioned right to waive counsel and defend himself.

28 U.S.C.A. 1654.

Duke v. U.S., 255 F.2d 721.

Collins vs. O'Brien, 208 F.2d 44

U.S. vs. Mitchell, supra.

Adams v. U.S. rel. McCann, 317 U.S. 269, 63 S.Ct. 336, 87 L.Ed. 268, 143 A.L.R. 435.

Granting a defendant leave to dismiss counsel and conduct his own defense is within the Trial Court's discretion.

U.S. vs. Foster, 9 F.R.D. 367.

As stated in the case of Johnson vs. Zerbst, 304 U.S. 458,

"The determination as to whether there has been an intel-

ligent waiver of the right must depend in most cases upon the particular facts and circumstances surrounding that cases, including background, experience and conduct of the accused."

Obviously the trail judge is placed in a position to be the one to determine whether an intelligent waiver has been made as he is the only person having the opportunity to observe these particular facts and circumstances. The Government shall attempt to set forth some of the facts and circumstances that the trail court might have considered in allowing Appellant to waive counsel during the progress of his trail.

The Appellant's counsel was not court appointed as stated in Appellant's Brief, page 27. Appellant's counsel was of his own choosing and was present at his arraigment and the trail of his case. It was apparent from the commencement of the trail that Appellant was desirous of handling his own defense and was attempting to do so even during the time he was represented by counsel. Several indications of this follow:

Defendant aided in quetioning the jurors, R.T. 10. Appellant refused to answer questions asked by his own counsel. R.T. 43. He directed counsel in legal arguments. R.T. 50-,54. Finally he attempted to take over the argument of several legal questions while he was still represented by counsel. Necessarily his actions and conduct were closely observed by the trial court. We quote from page 52 of the Reporter's Transcript to page 54 thereof.

"THE DEFENDANT: I believe Your Honor made the statement, they asked me if I wished to have the Information read to me and never mentioned if there was an indictment by the Grand Jury, or whether or not there was; the Information was given to the District Attorney for investigation.

"THE COURT: You were indicted by the Grand Jury and you pleaded not guilty to the indictment. You are now

on trial. No advantage has been taken of you. You are having your trial, and no body even asked you to waive indictment. Apparently they presented your case to the Grand Jury and you were indicted.

"THE DEFENDANT: Directing your attention then to July 3rd.

"THE COURT: Just a moment. I have discussed it all I am going to. You are represented by counsel. You have a right to counsel and you have counsel. Counsel will represent you. The reason for counsel is to give you the benefit of somebody who has knowledge of these things and knows the procedure and understands the technicalities of these things. I cannot educate you this morning or this noontime as to the criminal procedure. Mr. Macaluso, I will hear from you on anything you desire to present. You can consult with the defendant and present anything you want and I will let you make it on the record, but you will have to represent him as long as you are his counsel.

"THE DEFENDANT: May I make a motion before this Court to dismiss Mr. Macaluso as counsel and resume the responsibility of continuing further on my own?

"MR. MACALUSO: It is o.k. with me, Your Honor.

"THE COURT: I will grant you that right but you will have to bear in mind that if there is any untoward inference drawn by that from the jury, it is your responsibility.

"THE DEFENDANT: I am accepting that responsibility.

"THE COURT: I will also have to make it clear that you will have to proceed in accordance with the rules and the law and the procedures even though you may not have an acquintance with them. If you transgress them, I will

have to stop you. You will have to bear responsibility for all that.

"THE DEFENDANT: That is perfectly all right.

"THE COURT: Very well. The Court will grant the request of the defendant to permit him to complete the trial as his own counsel. The Court will discharge Mr. Macaluso from further responsibility.

"MR. MACALUSO: I do not have to appear at 1:30, Your Honor?

"THE COURT: That is correct. I am going to explain to the jury, Mr. Watts, that by agreement with you, Mr. Macaluso has withdrawn and you will handle the argument yourself."

The Court in the case of *People vs. Linden*, 338 Pac. 2d 397 discusses a similar position taken by a defendant. In many respects it is comparable to the situation the trial court was confronted with in this case. Describing this defendant, the Court said,

"Most of the problems here presented arise because defendant from the inception of this lawsuit has taken the position that the right to counsel includes the right to a court-appointed attorney to act in such varying capacities as defendant may from time to time see fit to require, as attorney of record yet subject to defendant's direction, or as legal advisor, or as a mere clerk."

Appearing without counsel at the time set for sentencing, the Appellant filed with the Clerk a Motion to Appeal. At this time the trial court gave the Appellant the opporunity to have counsel but again Appellant requested the right to represent himself. R.T. 71.

If this Honorable Court will refer to the docket in the Ninth Circuit of this matter, it will note the Appellant has filed several motions without the aid of counsel with a degree of success. The facts just discussed certainly show that no deprival of his rights existed. After being informed of the consequences of proceeding without the aid of counsel the Appellant requested that he finish the trial without counsel.

Presumably, if an accused during a trial decides that he wishes to proceed alone without delaying a trial and makes the decision with full knowledge of the risks he is taking, that course should be open to him in view of the fact he must have complete confidence in his counsel. *U.S. vs. Mitchell*, supra. Certainly, after a careful analysis of the instructions given by the trial court, R.T. 58, it is readily apparent that there was no lack of sufficient law or the application of any erroneous law. The Appellant admitted 3 previous felony convictions. R.T. 47. An instruction was given as to what weight should be given defendant's prior convictions. R.T. 62. Nor can the Appellant claim the court erred in not giving him sufficient time to prepare instructions or enter objections to those given. Once it is found that an accused has properly waived his right to counsel the effects flowing from the decision must be accepted by him together with the benefits he presumably sought to obtain therefrom. *Smith v. U.S.* 216 F.2d 724.

As stated in the case of *Burstein vs. U.S.,* 178 F.2d 665, p. 670,

> "When appelant chose to proceed without counsel he chose a course of action fraught with the danger he would commit legal blunders. But having made the choice he did not thereby accquire the right to have the court act as his counsel whenever he seemed to be blundering. It cannot be said that the Court denied him a fair trial because the judge refrained from intermeddling."

In the case *Earle L. Reynolds vs. U.S.*, No. 16249, decided by this Honorable Court June 1, 1959, which reversed the judgment of the District Court on the grounds that the District Court denied the Appellant's request to dismiss his counsel and represent himself, the Court stated:

> "In our view the District Court erred, in the circumstances of this case, by denying Appellant the right to conduct his own defense."

The Appellant intelligently and with full understanding of the implications waived his constitutionsal right to counsel and was permitted by the trial court, after having been advised of the dangers to which he exposed himself, to do what the Appellant wished, namely, to finish the trial without assistance of counsel.

ARGUMENT OF SPECIFICATION OF ERROR NO. 2.

THE TRIAL COURT DID NOT COMMIT ERROR IN PERMITTING THE STATE OFFICERS TO TESTIFY TO VERBAL STATEMENTS VOLUNTARILY MADE BY APPELLANT AND IN PERMITTING THE ADMISSION INTO EVIDENCE OF APPELLANT'S WRITTEN CONFESSION. (Government's Exhibit 2)

Again, the facts and circumstances are of such importance in the discussion of this Specification of Error, that we feel it will aid this Honorable Court if we set them forth in some detail.

Appellant was stopped for speeding near Seligman, Arizona by Officer Williams of the Arizona Highway Patrol at approximately 2:30 o'clock P.M. May 15, 1957. R.T. 18, 25. At the time Appellant was stopped he was driving a 1956 Cadillac Convertible and there were two men traveling with him. R.T. 18. Appellant was unable to produce a valid driver's license or the registration to the car. R.T. 18, 19. The State Officer requested Appellant to follow him to the Sheriff's Office in Ashfork, Ari-

zona, R.T. 20, a distance of 23 miles. Upon arrival at the Sheriff's office Appelant stated the car belonged to his father, Robert Stern. Robert Stern was in fact the true owner of the stolen car and had never seen the Appelant prior to the trial. R.T. 11, 12. Upon arrival at the Sheriff's office in Ashfork, Arizona, the Appellant stated that the passengers were hitch-hikers he had picked up enroute and they knew nothing about him or the automobile. R.T. 20. The hitch-hikers were then interviewed and released by Officer Williams of the Arizona Highway Patrol. R.T. 20. After the Appellant learned the hitch-hikers had been released and were on their way, the Appellant changed his story and told the State Officers that the car was a stolen car but that one of the passengers released by the officers actually stole it. R.T. 21. This complete reversal of his previous story necessitated the Officers of the Arizona Highway Patrol to put out a call to pick up the hitch-hikers. R.T. 21. By the time the hitch-hiker were located they were in Flagstaff, Arizona, a distance of 50 miles from Ashfork. This required a trip to Flagstaff by one of the Arizona Highway Patrolmen to pick up the hitch-hiker implicated by Appellant and return with him to Ashfork. R.T. 32. Subsequently, when Appellant learned that the hitchhiker had been apprehended and returned to Ashfork he again reversed his story and exonerated the hitch-hiker, who was later released. R.T. 33, 34. The closest F.B.I. Agent to Ashfork is located in Prescott, Arizona, a distance of 53 miles. Sometime during the afternoon of May 15, 1957 the F.B.I. Agent at Prescott was notified of this matter by the State Officers and asked to ascertain if the Cadillac was reported as a stolen car, which he did. R.T. 20. However, there is nothing in the record that indicates he had any knowledge of any investigation made by the Arizona Highway Patrol, made any request of them, or collaborated with the State Officers as suggested in Appellant's Brief,

page 21, nor is there one scintilla of evidence to be found in the Reporter's Transcript to substantiate the statement in Appellant's Brief, page 21, that continued questioning occured after the second release of the hitch-hiker. The conversation with Appellant testified to by State Officers are short and they were primarily made necessary by the Appellant's own actions. The Appellant in fact complained of being left alone. Appellant's Brief, page 22. On May 16, 1957, the day following Appellant's apprehension, Appellant was moved to Prescott, Arizona where he was turned over to Jeff Laird, Special Agent, Federal Bureau of Investigation. He was then taken before the United States Commissioner, R.T. 36. At the Commissioner's hearing the Appellant voluntarily admitted his guilt as shown by Report of Proceeding before Commissioner, a part of the record herein. No statement was taken by any Federal Officers prior to Appellant's appearance before the Commissioner. Immediately following the hearing a written statement, Exhibit 2, was made by the Appellant to the F.B.I. Agent. R.T. 36. Any delay prior to Appellant's appearance before the Commissioner was largely caused by Appellant's behavior and not by any State or Federal Officer.

The above related set of facts is so far removed and distinguishable from the facts in *McNabb vs. U.S.*, 318 U.S. 332, *Upshaw vs. U.S.*, 335 U.S. 40, *Mallory vs. U.S.* 354 U.S. 459 and *Anderson vs. U.S.* 318 U.S. 350, the chief cases relied upon by the Appellant that as applied to this case they lose all their significance and do not support the Appellant's position

The Transcript of the Record shows that no objection was made prior to the trial or during the trial to the introduction into evidence of the conversations between the State Officers and Appellant. R.T. 21, 22, or to the admissibility of Exhibit 2, R.T. 33. Objections to the use of evidence which it is claimed was illegally

obtained must be seasonably made or the right thereto will be lost.

Garhart vs. U.S. 157 F.2d 777, citing *Gould vs. U.S.* 255 U.S. 298, 41 S.Ct. 261, 65 L.Ed. 467.

Another very important distinction which makes the cases which support the McNabb Rule, relied upon by Appellant, inapplicable is that if the detention of the Appellant was unlawful he was detained by State Officers not acting in collaboration with Federal Officers and the statements, therefore, made by the Appellant prior to his arraignment before the United States Commissioner were not the fruits of any wrongdoing by Federal Officers. The only mistreatment claimed by hte Appellant consisted of being left alone without cigarettes. R.T. 29, 32. Appellant's Brief 22.

In *Horne vs. U.S.*, 246 F.2d 83, page 85, the Court said,

> "There was no error in admitting either confession against Appellant. The objection upon the grounds that each confession was obtained before Appellant was carried before a committing magistrate was not well taken for several reasons. According to the Sheriff, Appellant had orally confessed within a few hours after his arrest. There was creditable testimony that Appellant was not mistreated and that the confessions were reduced to writing by noon of the next day. Further, we have held that the McNabb Rule does not apply when accussed is detained by State Officers. *Brown vs. U.S.* 228 F.2d 286."

We find the same principle discussed in the case of Stephenson vs. U.S., 257 F.2d 175, 176.

> "Although Appellant was in custody some 13 days after his arrest and before he was taken before a United States Commissioner, he was not in Federal custody during that period. He was arrested under Federal Warrant July 25 at

which time he was immediately taken before a Commissioner. Under facts in this case McNabb vs U.S., supra, Anderson vs. U.S., supra, and Mallory vs. U.S. supra, are not applicable."

The Appellant attempts to imply that the F.B.I. Agent in the case collaborated with the State Officers, Appellant's Brief 21. As previously stated, the Transcript of Proceedings does not substantiate this position. Collaboration for this purpose requires active participation or active direction by Federal Officers with the State Officers *Bayer vs. U.S.* 273 U.S. 28, *Garhart vs. U.S.*, supra, *Anderson vs. U.S.* supra.

The McNabb rule is inapplicable when unlawful detention is by State Officers not acting in collaboration with Federal Officers.

Brown and Hoage vs. U.S., 228 F.2d 286.

Anderson vs. U.S., 318 U.S. 350.

White vs. U.S., 200 F.2d 509, 512, 513, Certiorari denied 345 U.S. 999, 73 Sup. Ct. 1142, 97 L.Ed 1405.

U.S. vs. Harris, 211 F.2d 656, 660.

At the time of his oral admission, the Appellant was legally in the custody of State Officers and was not charged with a Federal offense. Clearly his admissions were not "use by Government of erroneous doing by its officers." *Lambert vs. U.S.*, 261 F.2d 799.

There can be no question about the admissibility of the written statement made to the F.B.I. Agent. It was taken several hours after the verbal statements were made to the State Officers, and after Appellant had been before a Commisioner and verbally admitted his guilt. There is not even a suggestion by Appellant that he was coerced, frightened or intimidated in any way prior to or during hte time he made his statement to the F.B.I. Agent.

CONCLUSION

After a review of the questions raised, it readily becomes apparent that Appellant was not deprived of any fundamental or constitutional right and that he received a fair and impartial trial. The facts clearly reveal that Appellant's own statements and acts perpetrated the very things he now claims deprived him of his fundamental rights. It is respectfully urged that the judgement of conviction be affirmed.

Respectfully submitted,

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